FCC 95-180

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 27, 1995 Released: May 15, 1995

Comment Date: July 14, 1995
Reply Comment Date: August 15, 1995

By the Commission:

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I. INTRODUCTION

1. In 1986, the Commission adopted a rule preempting local regulation of satellite earth stations that differentiated between satellite receive-only antennas and other types of antenna facilities unless the regulations (a) have a reasonable and clearly defined health, safety, or aesthetic objective and (b) do not put unreasonable limitations on, or prevent, reception or impose unreasonable costs on users. The rule also preempted local regulation of satellite transmitting antennas in the same manner except that health and safety regulation was not preempted.[1] Since that time, consumers, satellite system operators, local governments, and the Commission have gained significant experience working with this rule. Based in part on this experience, the Satellite Broadcasting and Communications Association ("SBCA") and Hughes Network Systems, Inc. ("Hughes") filed petitions for declaratory rulings on our satellite-antenna preemption rule. In addition, the U.S. Court of Appeals for the Second Circuit has invalidated our requirement that satellite-antenna users exhaust all other legal remedies before petitioning the Commission for a declaratory ruling. Town of Deerfield, New York v. FCC, 992 F.2d 420 (2d Cir. 1992) ("Deerfield"). In 1993, we sought comment on the SBCA and Hughes petitions, as well as the appropriate action for the Commission to take in response to the Second Circuit's decision.

2. Based on the petitions, the comments received in this proceeding, and our experience administering Commission preemption policies since 1986, we tentatively conclude that, in light of the Second Circuit's Deerfield decision, we should modify our exhaustion of remedies requirement to permit us to interpret our preemption rule prior to any judicial review. We also tentatively conclude that in order to facilitate application of the Commission's interpretations in varied factual settings, to minimize intrusion upon local prerogatives in land-use regulation, and to promote full and fair competition between satellite services and other means of communication, we must revise the preemption rule itself. Accordingly, we are denying both petitions for declaratory relief and issuing this Notice of Proposed Rulemaking, which proposes changes in section 25.104.[2] In addition, we announce our willingness to entertain petitions for declaratory relief with respect to particular zoning disputes during the pendency of this proceeding.

II. BACKGROUND

3. In our 1986 Order[3] adopting the rule (the "Preemption Order"), we emphasized the strong federal interest in facilitating the distribution of interstate satellite communications:

> [T]he broad mandate of Section 1 of the Communications Act, 47 U.S.C. § 151, to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system establish the existence of a congressional objective in this area. More specifically, the recent amendment to the Communications Act, 47 U.S.C. § 705, creates certain rights to receive unscrambled and

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1 See 47 C.F.R. § 25.104.

2 See In re Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 100 F.C.C.2d 846, 847 (1985) (NPRM).

3 In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) (Report and Order).

> unmarketed satellite signals. These statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.[4]

We explained that the federal interest was also expressed in "competitive regulatory policies which have been promulgated to provide for a variety of services . . . . It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice."[5] Although some commenters attempted to minimize the federal interest by arguing that video programming was already available by other means such as cable, we expressly rejected this reasoning and stated that users should have access to a broader range of programming choices.

4. We also recognized, however, that zoning regulations have traditionally been enacted and administered by local authorities pursuant to the states' police powers. This led us to adopt only a limited preemption of local zoning restrictions.[6] Section 25.104, as adopted, provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations
>
> a) have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> b) do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment.
>
> Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.[7]

5. Absent from section 25.104 is any provision for enforcement by the Commission. In our Preemption Order, we stated that we did "not intend to operate as a national zoning board." Rather, we said, "we expect that local authorities will conform their regulations to our standards and that they will make determinations which are in the best interests of their communities that reflect federal policy."[8] However, we also made clear that we would not abdicate our ultimate responsibility for protecting access to satellite communications:

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4 Preemption Order ¶ 23.

5 Id. ¶ 26.

6 See, e.g., Id. ¶¶ 27-28.

7 47 C.F.R. § 25.104.

8 Preemption Order ¶ 39.

> Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standard adopted here in pursuing any legal remedies they might have. In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards. Any party requesting Commission review of a controversy will be expected to show that other remedies have been exhausted.[9]

Since 1986, the Commission has received numerous complaints about restrictive local regulations. Pursuant to our Preemption Order, the citizens filing these complaints have been informed that they must exhaust other legal remedies before requesting Commission relief.

6. In 1991, SBCA filed the first of the two petitions for declaratory relief that are before us. SBCA, an association representing the interests of the home satellite dish industry, asserts that "it is clear that local case-by-case enforcement of the Preemption Order is not working."[10] SBCA requests a declaratory ruling "containing five key points": (1) an extension of the preemption rule to cover ordinances that effectively ban all antennas (rather than requiring discrimination against satellite facilities); (2) an exemplary list of presumptively unreasonable types of zoning regulations; (3) an announced intention by the Commission to review at least some zoning disputes directly; (4) the elimination of any requirement for an evidentiary hearing in zoning preemption cases; and (5) a timetable for expedited Commission action in zoning preemption cases.

7. We received comments in response to the SBCA petition when it was originally filed in 1991. However, we deferred action on the petition pending final disposition of In re Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd. 2172 (1992). In that case, we granted a petition for declaratory relief filed by Joseph Carino, requesting preemption of the antenna ordinance of Deerfield, New York. The Commission found that Mr. Carino had sufficiently exhausted other remedies,[11] that the Deerfield ordinance unreasonably restricted his right to receive satellite-delivered signals, and that the ordinance was thus preempted.[12] The Commission's order was reversed by the U.S. Court of Appeals for the Second Circuit, which held that the Commission did not have authority to review local zoning disputes after a federal court had already decided that the ordinance was not preempted.[13]

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9 Id. ¶ 40.

10 SBCA Petition for Declaratory Ruling (April 16, 1991) ("SBCA Petition"), at iv.

11 Mr. Carino filed an action in the New York state trial level court and appealed its adverse ruling to the state Appellate Division and to the Court of Appeals of the State of New York. After losing in these courts, he filed an action in the U.S. District Court which ruled he was collaterally estopped from relitigating these issues [Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990)] and that ruling was affirmed by the Court of Appeals for the Second Circuit [Carino V. Town of Deerfiled. Doc. No. 90-9116 (2d Cir. June 21, 1991).

12 In re Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd. 2172 (1992).

13 Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1992). The Second Circuit did not discuss whether the same principles would apply to a state-court ruling.

8. In 1993, following our decision on the Deerfield ordinance and the Second Circuit's reversal, Hughes filed the second of the petitions for declaratory relief currently before us. Hughes is a leading provider of Very Small Aperture Terminal (or "VSAT") antenna systems. It asks the Commission to declare that any restriction on the installation of a satellite terminal two meters or less in diameter, in an area designated for commercial or industrial use, is per se discriminatory and unreasonable (and therefore preempted) under our rule. Hughes also asks the Commission to establish procedures for enforcement directly by the Commission.[14]

9. On May 18, 1993, we issued a public notice seeking comments on the Hughes petition, the SBCA petition, and the appropriate action for us to take in light of the Second Circuit's decision in Deerfield. Comments filed by industry representatives generally support clarification of or changes to the rule.[15] Some commenters urge that the Commission's preemption policies be extended to all communications facilities.[16] There is also widespread industry support for greater Commission involvement in direct review of zoning disputes. Municipal representatives uniformly oppose any greater federal preemption, but differ among themselves about the merits of direct Commission review.[17]

10. In addition, at the Commission's suggestion, industry and local government representatives met to discuss the issues involved in this proceeding. We believed discussions would be useful in allowing the parties to share concerns with each other, and we hope they will foster greater cooperation between these groups in the future. We also anticipate that the comments filed in response to this Notice will be particularly helpful as a result of these discussions.[18]

III. DISCUSSION

A. Evidence on Zoning Practices Under the Current Rule

11. The petitioners and commenters offer substantial, detailed evidence that many local zoning restrictions are creating unreasonable barriers to the growth of satellite-based services. Local

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[14] Petition of Hughes Network Systems, Inc. for Declaratory Relief (April 19, 1993) ("Hughes Petition"). Neither petitioner requests preemption of deed covenants or homeowners' association rules. We do not now propose to extend our preemption rule to these types of private restrictions. However, the Commission has received many complaints that such private restrictions are unduly interfering with access to interstate satellite communications. This issue may need to be addressed at a later date.

[15] In addition to formal comments, we received several letters from Hughes's customers supporting its petition and these will be included in the record as informal comments. All of these comments have been considered. A list of commenters is attached as Appendix I.

[16] Comments of National Association of Broadcasters (July 12, 1993); Comments of Association for Maximum Service Television (July 12, 1993); and Comments of American Radio Relay League, Inc. (July 12, 1993).

[17] Comments of the National League of Cities (July 12, 1993); Comments of the Northwest Municipal Cable Council (July 12, 1993); Reply Comments of the City of St. Louis (August 16, 1993).

[18] See Letter to Chief, International Bureau from Satellite Industry Representatives, Letter, (March 17, 1995).

governments, in turn, have indicated concern that our preemption policies not unduly impact their significant interest in regulating land use in their communities. We summarize this evidence below.

1. Residential Installations

12. SBCA's petition and the many comments filed in its support are directed primarily to services that deliver video programming directly from domestic C-band[19] satellites to residential subscribers with antennas that are eight to twelve feet in diameter. While this is the most common antenna size used for direct-to-home reception of programming at this time, new technologies are being developed and implemented that will permit reception of signals in higher frequency bands using much smaller antennas. We request comment on whether technological advances have made it possible to use smaller antennas for reception of C-band signals. Apart from flat bans on satellite-antennas that are patently inconsistent with our existing rule, the comments describe several types of local regulations that effectively prohibit earth stations on particular lots for various reasons. In Deerfield, for example, the town prohibited dish antennas on lots less than one-half acre in size. Anyone living on a lot smaller than one-half acre could not obtain permission to install an antenna.[20] In other cases, approval has been made subject to neighborhood consent; a would-be antenna user whose neighbors object, for whatever reason, can be denied the right to install an antenna.[21]

13. Furthermore, because satellite antennas must have a "line of sight" to the space station that is not blocked by buildings or vegetation, even residents who are able to obtain installation permits may be faced with placement restrictions that substantially impair reception. For example, some local ordinances only allow satellite antennas to be installed in a rear yard. Others require that antennas be set back a certain distance from the property line. Because trees or other terrain factors can obstruct the line of sight to all or a substantial number of satellites from the permitted locations, these ordinances can limit or prevent reception from certain lots.[22] In some cases, zoning codes contain no procedures for obtaining variances from such provisions.[23] Even where variance procedures exist, they often result in cumbersome and expensive proceedings that burden the antenna user's access to satellite programming.[24]

14. In addition to lot-size restrictions, neighborhood consent requirements, and placement restrictions, SBCA asserts that local ordinances commonly contain height restrictions that render C-

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19 This designation refers to the 4/6 GHz frequency bands.

20 Deerfield, 992 F.2d at 423.

21 See Comments of American Satellite Television Alliance (March 14, 1991), at 15-19, (describing how one home owner in Ojai, California obtained preliminary approval from municipal authorities but was ultimately denied a permit because of neighbors' objections regarding visual impact).

22 See Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1031 (D.N.J. 1988); Alsar Technology, Inc. v. Zoning Board of Adjustment of the Town of Nutley, 563 A.2d 83, 88 (N.J. Super. L. 1989); Johnson v. Pleasanton, 781 F. Supp. 632, 638-39 (N.D. Cal. 1991).

23 E.g., Alsar Technology, 563 A.2d at 88.

24 Van Meter, 696 F. Supp. at 1032. In addition, variance decisions may be standardless, or may be based on standards that do not reflect the strong federal interest in promoting access to satellite-delivered video programming. Id., 696 F. Supp. at 1031.

band satellite antennas unusable. In most areas of the country, a C-band antenna must be eight to twelve feet in diameter to receive an adequate signal.[25] Yet according to SBCA, many jurisdictions limit antenna size to six feet.[26] Restrictions on antenna height may also restrict pole mounting,[27] which can achieve a better line of sight to the satellite.

15. Other commenters complain about excessive costs imposed by local authorities in connection with permit procedures. They state that fees for the permit itself are sometimes excessive and associated costs can be unduly burdensome, especially where ordinances require hearings, notification of neighbors, or the submission of highly detailed engineering, architectural, or landscaping plans.[28] Requirements that antennas be "screened" from view can require considerable landscaping expense. For example, one local jurisdiction attempted to impose a $12,887.27 landscaping plan on a $5,768 antenna installation. Although it was later reversed, the trial court ruled that this was not excessive because the value of the house involved was $750,000.[29] Still other jurisdictions require such extensive screening that antenna line of sight to some satellites is blocked.[30]

16. Antenna users are not the only persons affected by restrictions on residential installations. Equipment manufacturers,[31] installers of satellite systems,[32] and producers of satellite-delivered programming[33] assert that they too have suffered economic and other harm as a result of unreasonable restrictions. The record thus reflects widespread industry support for further Commission action in this area.

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25 Preemption Order at n.77; In re Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, 7 F.C.C. Rcd. 456 (1992) ("3° Spacing").

26 SBCA Petition at 17; Van Meter, 696 F. Supp. at 1030.

27 SBCA Petition at 20; Cawley v. City of Port Jervis, 753 F. Supp. 128, 132 (S.D.N.Y. 1990). Interestingly, other jurisdictions effectively require pole mounting by prohibiting less expensive roof mounting. See Nationwide v. Zoning Board of Adjustment, 578 A.2d 389, 392 (1990) (testimony indicated that pole mounting cost the consumer an extra $3,500 to $4,000).

28 In another example cited by commenters, an ordinance in Olympia, Washington required all earth station installations to be in the rear yard. Those who could not get reception in that location were forced to comply with a cumbersome variance procedure that required high fees, expensive plans, notification of neighbors, and a public hearing. Such burdensome procedures, according to commenters, will often discourage applicants who ultimately decide to abandon their plans to install earth stations. See Comments of ASTA (March 14, 1991), at 10-15.

29 See City of Bloomfield Hills v. Gargaro, 443 N.W.2d 495 (Mich. App. 1989) (reversing the trial court's decision). The trial court's decision, which is unreported, is described in Comments of Satellite Dealers Ass'n of Michigan (July 2, 1991), at Exhibit A.

30 SBCA Petition at 19.

31 See, e.g., Comments of General Instrument Corp. (July 12, 1991); Comments of Tandy Corp. (July 12, 1991).

32 See, e.g., Comments of Chris TV (February 28, 1992); Comments of Camco Cable Service (May 28, 1993).

33 See, e.g., Comments of Home Box Office (July 12, 1993).

2. Commercial Installations

17. Hughes, a provider of private satellite networks to business users, describes the extent to which local regulations are impeding installation of commercial antennas, particularly VSAT systems. VSATs operate in the Ku-band[34] using transmit/receive antennas ranging in size from 1.2 meters to 2.4 meters in diameter. Hughes states that VSAT networks are used by corporations in a variety of industries, including retail, petroleum, automobile, and financial services. These industries are characterized by the need for many widely dispersed stores, branches, or offices to be connected to central locations for inventory control, sales and price updates, accounting, real-time stock market quotations, teleconferencing, reservation scheduling, and other applications. Hughes asserts that many local jurisdictions continue to enforce discriminatory regulations that plainly conflict with the Commission's rules and impede interstate communications using VSAT networks.

18. Hughes says that VSAT installations are subject to many local prohibitions that do not apply to other types of antennas. For example, some jurisdictions ban all transmitting antennas, or only permit receive-only antennas.[35] These types of ordinances effect a total prohibition on VSAT installations. Hughes asserts that this discriminatory treatment of VSAT antennas is especially inappropriate because VSATs are smaller than many receive-only antennas and are customarily installed in commercial or industrial areas rather than residential areas.[36]

19. Other local restrictions criticized by Hughes are similar to those that affect residential installations. Hughes asserts that unreasonable screening requirements, for example, can cost between $2,500 and $5,000, with an average of $3,700, more than one-third the typical $10,000 cost of a VSAT installation, including the equipment.[37] Screening is sometimes required to be as high as the antenna and to be architecturally harmonious with the building (as in Boca Raton, Florida). Screening ordinances may also require approval by an "Appearance Review Commission" (as in Libertyville, Illinois) or an "Architectural Review Board" (as in Mamaroneck, New York). Hughes relates that one New Jersey city initially required that the entire roof of a building be screened with a matching parapet at a cost of $42,000.[38] Furthermore, some jurisdictions[39] require that antennas be painted a certain color to blend with the surroundings. Hughes states that because antennas are normally made of fiberglass and covered with a special coating that sheds water and improves reception, they cannot be readily repainted. This has forced Hughes to have antennas specially manufactured or recoated on site, adding from $500 to $3,000 to the cost of the installation.

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34 This designation refers to the 12/14 GHz frequency bands.

35 Hughes cites the zoning codes of Greenburgh, New York, and Plantation, Florida.

36 Hughes Petition at 9-10. Hughes cites Carol Stream, Illinois and Mamaroneck, New York as jurisdictions that do not differentiate between differently-zoned areas of their cities in their satellite-antenna ordinances.

37 Hughes Petition at 14-15.

38 Hughes Petition at 14 n.28.

39 Hughes cites the zoning codes of San Carlos, California; Radnor, Pennsylvania; Juno Beach, Florida; and Bloomingdale, Illinois.

20. Hughes also complains about high fees sometimes charged in the local approval process. Building permit fees, for example, can range from $35 to $2,500, with an average of $150. Other fees may be charged for soil tests, environmental impact reports,[40] site inspections, and copying and distribution. Some jurisdictions require that a bond be posted in connection with the permit process.[41] According to Hughes, other procedural requirements such as site surveys ($275-$375), engineering drawings ($275-$450),[42] and processing and presentation costs ($800-$1,000) further increase the total cost of installation and create needless delay.[43]

21. Hughes also notes that many jurisdictions prohibit any rooftop installation,[44] which is the quickest and least costly option for the large majority of users. Ground installation often requires a longer cable run, which can add between $600 and $1,000 to total installation costs. In addition, ground installation takes up valuable commercial real estate that could be used for other purposes, and often makes the antenna more visible to the general public than it would be on a rooftop. This makes VSATs less attractive to the customer, according to Hughes, and therefore makes satellite service less competitive.

22. Hughes asserts that some local regulatory schemes require applicants to seek variances or special use permits without providing any written standards for these authorizations.[45] According to Hughes, the difficulty lies in the treatment of an antenna installation as the exception rather than the rule. This places the burden on the antenna user to provide, for example, proof of ownership or a plot survey; or to contact all property owners within a given radius and ask if there are any objections; or to demonstrate how the special use or variance would serve the public interest. Even when a variance is ultimately granted, the "exceptional" nature of the proceeding creates unnecessary and unreasonable complexity and delay.[46]

23. Hughes argues that many of the problems it has encountered stem from the misuse by local jurisdictions of the discretion given by the Commission's rule, and from the exhaustion of remedies requirement which hinders efficient enforcement of the rule. Hughes asserts that business

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40 Carmel, California requires a $2,000 archaeological report.

41 For example, Hughes states that Northfield, New Jersey requires that $1,000 be placed in escrow to cover the city's expenses. Hughes Petition at 17, n. 33.

42 Hughes states that engineering drawings are required so frequently that Hughes must maintain arrangements with engineers licensed in all fifty states. Hughes Petition at 18.

43 In addition, some jurisdictions require numerous stamped copies of documents, thus adding to the cost. For example, White Plains, New York requires thirty-six copies of engineering drawings. Hughes Petition at 19, n. 39.

44 Hughes cites the zoning codes of Lauderhill, Florida and Voorhees, New Jersey.

45 Hughes Petition at 21.

46 Hughes states that Brookline, Massachusetts requires a "special permit" as well as an environmental impact statement, and also requires screening upon installation. Requests for "special permits" are considered in three stages: first staff review, then Planning Board design approval, then zoning approval by a Board of Appeals. Hughes estimates the extra cost of this procedure to be $5,000 per antenna, excluding screening costs. Hughes Petition at 22, n. 42.

users face particular obstacles to effective relief from vague or overly burdensome local regulations. These users must consider the economics of their situation and are reluctant to initiate litigation against a city in which they have to operate, particularly if they need other city permits. The expense of litigation to install one antenna is difficult to justify economically, according to Hughes, because it negates one of the primary benefits of VSAT technology: quick and inexpensive installation. Hughes states that the prospect of litigation is almost certain to lead to cancellation of the installation order.[47]

24. Other VSAT operators agree that local zoning restrictions have hampered their activities. GTE states that it has experienced difficulties similar to those described by Hughes and that satellite service providers have been competitively disadvantaged because of such unreasonable installation fees and delays. It submits a chart listing ordinances from all areas of the country that require board meetings or fees greater than $100 for installation approval.[48]

25. Several Hughes VSAT customers express support for Hughes's petition and indicate that they have experienced problems with local zoning. They stress the need for quick and inexpensive installation in implementing their business plans.[49]

3. New Satellite Services

26. In addition to direct-to-home C-band services and commercial VSAT services, several emerging satellite services will use much smaller antennas, primarily in residential areas. For example, Direct Broadcast Satellite ("DBS") services will deliver approximately 150 channels of video programming directly to residential customers using antennas only eighteen inches in diameter. These antennas can be installed, in some cases by the customer, on the side of a house, on a roof, or in a yard. Two competing DBS services are already in operation and other licensees hope to enter this market as soon as they can launch their satellites. Although this new service had not yet become available when either the SBCA petition or the Hughes petition was filed, two DBS service providers have expressed concern that overly restrictive zoning policies will hamper its development.[50] These services are important because they provide competition to cable television service.

27. Another video service provider, Prime Star, has begun full-scale, direct-to-home service using portions of the Ku-band allocated for fixed-satellite service.[51] Prime Star leases transponders on a satellite operated by GE Americom, from which it transmits programming to antennas less than a meter in diameter. Prime Star plans to use digital compression techniques which will enable it to offer approximately thirty channels.

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47 Hughes Petition at 31.

48 Comments of GTE Spacenet Corp., attachment (July 12, 1993). See also Comments of EDS Corp., (July 12, 1993), at 3 (time and expense of obtaining local approval imposes excessive costs on the deployment and expansion of VSAT networks); Comments of Schlumberger Technology Corp. (July 12, 1993).

49 Comments of Melville Corp. (July 6, 1993); Comments of Walgreens (July 12, 1993); Comments of The TJX Companies, Inc. (July 12, 1993); Comments of Toys "R" Us (July 12, 1993); and Comments of Target Stores (July 12, 1993).

50 Reply Comments of DirecTv, Inc. (August 16, 1993); Reply Comments of United States Satellite Broadcasting Co., Inc. (August 16, 1993).

51 DBS operates in other portions of the Ku-band.

28. Finally, Hughes Communications Galaxy, Inc., the parent of DBS provider DirecTv, has filed an application proposing a Ka-band[52] satellite system that will provide a wide range of video, audio, and data services to residential and commercial customers, at low cost and high speed. The proposed system would use transmit/receive antennas as small as twenty-six inches in diameter.

29. The emergence of these new satellite services demonstrates the competitive nature of satellite services and the increasingly important role satellite technology can be expected to play in our national information infrastructure. Likewise, there appears to be a trend toward smaller antennas that are presumably less aesthetically objectionable than larger ones. However, the ordinances highlighted in the record do not generally recognize any distinction among satellite antennas based on size.

4. Views of Municipal Government Representatives

30. Three entities representing interests of local governments submitted comments in response to our public notice. The National League of Cities ("League") strongly opposes preemption of municipal zoning authority, calling such preemption a "federal intrusion."[53] The League stresses the complexity of each individual zoning decision, and asserts that the per se approach advocated by Hughes "would strike down . . . valid restrictions on satellite dishes for a small minority of those that may be unreasonable."[54] The League does not address the particular types of restrictions highlighted by commenters in the satellite industry. It suggests, however, that the interests served by local restrictions are likely to be weighty because "it is against a city's best interests to create unreasonable burdens on business and industry."[55]

31. The Northwest Municipal Cable Council ("Northwest"), which represents seven Chicago-area communities, asserts that much of the information provided by the satellite industry is exaggerated. Northwest states that satellite dishes two meters or less are already a permitted use in residential areas. It further states that while some communities require special use application for commercial areas, most do not. Permits are required to cover costs of inspections to ensure public safety, adherence to electrical codes, and proper mounting for the weight of the antenna. These procedures would be followed for the addition of any structure.[56]

32. The City of St. Louis also filed comments indicating concern about the operation of a per se preemption and stating that it is not unreasonable to request antenna screening, to hold public hearings on behalf of affected neighborhoods, to protect historic areas, or to demand fees to cover building inspections or insurance requirements to protect neighbors. The city concedes that ".0001%" of communities might ban antennas but asserts that the petitions are "a classic case of killing a gnat with a shotgun." The city is also concerned that the use of the terms "industrial or commercial" is overbroad and vague.

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52 This designation refers to the 18/30 GHz bands. See File No. 3/4-DSS-P/LA-94.

53 Comments of the National League of Cities (July 12, 1993), at 1.

54 Id.

55 Id.

56 Comments of Northwest at 2

33. In addition to these formal comments, the Commission has received several letters from local jurisdictions expressing concerns about zoning issues[57] These letters stress the local nature of land-use regulation and state that zoning decisions should be made by local and not federal authorities. Some commenting jurisdictions state that the Commission's current preemption rule is adequate to protect the interests of antenna users.

34. In order to supplement these submissions and gain more insight into localities' positions on these issues, the Commission suggested that representatives from local governments meet with satellite industry representatives to discuss and explain their concerns. Commission staff did not participate. Representatives from both sides indicated that the meetings, which took place in February and March of this year, were extremely helpful. The Commission appreciates the efforts taken to facilitate these meetings and we look forward to the particularly focused comments that should result from this exchange of ideas. We request additional comments from a wider cross-section of local governments on all of the issues discussed in this Notice.

5. Effects of Commission Forbearance

35. Both SBCA and Hughes ask the Commission to abandon its requirement that antenna users exhaust their other legal remedies before seeking Commission review. Industry commenters also support procedures for greater Commission review.[58] Commenters maintain that the exhaustion requirement has blunted the effect of our rule, unduly limiting the Commission's ability to protect the federal interest. These commenters argue that the Commission is uniquely positioned to assess the extent to which local zoning regulations encroach upon this federal interest. Accordingly, many urge the Commission to require that a claimant exhaust only nonfederal administrative remedies before requesting Commission review.[59] The increased administrative burden on the Commission would, according to this view, be justified by the need to promote access to satellite services.

36. One municipal representative supports greater Commission review. The Northwest Municipal Cable Council (representing seven Chicago-area cities and villages) states that our current exhaustion requirement is "burdensome to everyone involved and should be streamlined through the Commission."[60] Northwest suggests a less formal complaint procedure by which the complainant can request Commission review by submitting the written denial by the locality and a letter requesting relief. Under Northwest's proposal, the Commission would be required to decide within thirty days whether to review the case; only then would we ask for further information. The parties would then have thirty days to respond to any Commission requests for additional information, and the Commission would have an additional thirty days within which to issue a decision.

37. Other commenters disagree. The American Satellite Television Alliance ("ASTA") asserts that Commission enforcement would not serve the public interest if it would force consumers to

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57 See, e.g., letters from County Council of Baltimore Co., Piedmont Triad Council of Governments, and Prince Georges's County Government.

58 See, e.g., Comments of Home Box Office (July 12, 1993); Comments of Schlumberger Technology Corp. (July 12, 1993); Reply Comments of United States Satellite Broadcasting Co., Inc. (August 16, 1993); and Reply Comments of DirecTv, Inc. (August 16, 1993).

59 See, e.g., Comments of HBO, DirecTv, Northwest, and GE Americom.

60 Comments of Northwest Municipal Cable Council (July 9, 1993), at 2.

come to Washington, D.C. or hire Washington lawyers to represent them before the Commission. ASTA also contends that direct Commission review could turn the Commission into a national zoning board of appeals, diverting time and attention from our other responsibilities. ASTA believes that limited modification and clarification of the rule is more appropriate.[61]

38. The National League of Cities states that the Commission should not change its exhaustion rule in response to Deerfield, but should instead rely exclusively on the courts to protect the federal interest from nonfederal encroachment.[62] The City of St. Louis states that adequate procedures exist on the local level.[63] In a letter reflecting continuing discussions among the interested parties, satellite representatives indicated that after their meetings with local government representatives, the latter group acknowledged the necessity for review procedures.[64]

39. SBCA and Hughes both request specific procedures to remedy the problems they perceive with the current policy. SBCA requests, among other things, that the Commission (a) institute a rulemaking proceeding to amend sections 1.91 and 1.92 of the Commission's rules to eliminate trial-type evidentiary hearings in cease and desist proceedings involving the preemption rule; (b) expedite review of preemption cases by imposing a relatively short deadlines on virtually each intermediate step in the highly structured process; (c) require all trial-type hearings to be conducted in Washington on an expedited basis; (d) prohibit time extensions; and (e) clearly place the burden of proof in a show-cause hearing on the local authority.

40. Hughes suggests a similarly detailed approach. Hughes proposes that the Commission receive and act on petitions that implicate the preemption rule, which petitions are to be no more then ten pages and must show service upon the local jurisdiction along with a statement of Commission procedures. The local jurisdiction would have fifteen days to respond to the petition and to certify that it is familiar with Commission rules. If the local jurisdiction did not respond within fifteen days, the Commission would issue a "summary form" declaring the ordinance preempted. If the jurisdiction filed a statement materially disputing the allegations, the petitioner could request that the Commission resolve the dispute by conference. Otherwise, the local jurisdiction would have ten days in which to answer the petition and the Commission would have ninety days in which to announce a decision.

B. Proposed Modification and Clarification of the Rule

41. In resolving the issues before us, we are faced with a conflict between two very important principles of government. On the one hand, we are responsible for promoting the federal interest in nationwide communications systems,[65] including access to satellite-delivered communications where appropriate.[66] In pursuit of this federal interest, we have stated many times the

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61 Comments of American Satellite Television Alliance (July 12, 1991). See also Comments of Michael Couzens (July 12, 1991).

62 Comments of the National League of Cities (July 12, 1993), at 2.

63 Comments of City of St. Louis (August 13, 1993).

64 Letter at 2.

65 See 47 U.S.C. § 151.

66 See 47 U.S.C. § 705.

strong federal interest in ensuring that users have reasonable access to satellite signals. Such is our mandate from Congress, and when nonfederal regulation "stands as an obstacle to the accomplishment of a congressional purpose," such regulation is subject to preemption.[67] On the other hand, we must, to the maximum extent possible, respect principles of federalism. Those principles are particularly weighty in this case because the nonfederal regulations in question are not overt attempts to assert control over interstate communications; they are local land-use restrictions that lie at the core of state and local police powers.

42. We cannot ignore our responsibility to protect and promote the strong federal interest in widespread access to satellite communications. Our existing preemption rule is directed toward protecting this interest. The Second Circuit's decision in Deerfield makes it clear that the Commission will have little or no opportunity to interpret and enforce this existing rule unless our exhaustion requirement is modified, and we therefore propose to do so. However, the one point on which virtually all commenters agree is that the Commission cannot and should not become a national board of zoning appeals -- a position with which we strongly concur. If the Commission is to interpret and enforce its preemption rule in specific zoning disputes, it is absolutely essential that the rule be drafted in such a way that an interpretation in one case can set useful precedent for later cases. Case-by-case determinations of reasonableness, with each case dependent almost entirely upon its own facts, will be unmanageable for the Commission. Nor can we imagine a more intrusive form of preemption, since overly fact-specific rulings would leave local governments with little ability to discharge their obligation to comply with federal law in the first instance.

43. In addition, the evidence compiled in this record indicates that local zoning restrictions have inhibited access to satellite services for a substantial number of users, widely dispersed throughout the country. The obstacles faced by these users appear to have hampered the development of existing satellite services and impeded the growth of related industries such as programming and antenna manufacturing. Moreover, the record suggests that local restrictions currently in force are likely to have a similar effect on new satellite services as they are developed. We see no evidence that the petitioners and commenters have exaggerated the extent of the difficulties. It appears that adjustments to our preemption rule are necessary to minimize the inhibitory effect of state and local zoning regulations and to advance the important federal interest in the widest practicable access to satellite signals.

44. Accordingly, after considering the strong interests on both sides of this issue, we propose to modify the preemption rule in the following ways. First, we propose procedures by which the Commission will review zoning disputes after exhaustion of only the local administrative remedies, not "all legal remedies." Second, we propose substantial revisions in our basic preemption standard, designed to provide greater certainty without abandoning the fundamental test of reasonableness. Third, we propose an explicit procedure by which cities can request waivers of the entire preemption rule. We also announce our willingness to entertain, on an interim basis, petitions for declaratory relief in particular cases under our existing rule.

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[67] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52 (1941)). See also Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461 (1984); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) at ¶ 23.

45. In formulating our proposals, we have attempted to address the problems we perceive in the least restrictive or intrusive way possible. The changes we propose are intended to modify our preemption rule in such a way as to minimize costs on local governments and on antenna users and to accommodate the legitimate interests of both. By providing greater certainty in our reasonableness test, we hope that localities will be better able to enact and enforce zoning policies that accommodate federal interests while preserving local autonomy. Our goals are to promote healthy competition and to facilitate access to satellite-delivered services. We request comment, particularly from local governments, on whether there are any less restrictive alternative solutions that would accomplish these goals.

46. To codify these proposed changes, we propose to modify section 25.104 to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits reception by receive-only antennas, or imposes substantial costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(1) a clearly defined and expressly stated health, safety, or aesthetic objective; and

(2) the federal interest in fair and effective competition among competing communications service providers.

(b) Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of:

(1) a satellite receive-only antenna that is two meters or less in diameter, in any area where commercial or industrial uses are generally permitted by local land-use regulation; or

(2) a satellite receive-only antenna that is one meter or less in diameter in any area.

(c) Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question

(1) is necessary to accomplish a clearly defined and expressly stated health or safety objective;

(2) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(3) is specifically applicable to antennas of the class mentioned in paragraph (b).

(d) Regulation of satellite transmitting antennas is preempted to the same extent as provided in paragraph (a) of this rule, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas are not preempted by this rule.

(e) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;
(2) the petitioner's application for a permit or other authorization required by the state or local authority has been pending with that authority for ninety days;
(3) the petitioner has been informed that a permit or other authorization required by the state or local authority will be conditioned upon the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or
(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(f) Any state or local authority that wishes to maintain and enforce regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create a necessity for regulation inconsistent with this section. All waiver applications shall include the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

We believe this expanded preemption of unreasonable local regulations is necessary to promote greater access to satellite-based communications technologies nationwide, on terms of full and fair competition with other communications services, while minimizing the Commission's involvement in local affairs. In addition, we believe the proposed changes in Commission policy will promote the growth of the satellite industry.

47. In proposing to modify section 25.104, we stress our desire to receive comments from representatives of all the affected parties -- users, service providers, equipment manufacturers and installers, and municipal governments -- in order to create a record that is as complete as possible. We also request comments on the likely practical effects of the proposed rule changes. We now turn to an explanation of the specific changes we are proposing.

1. Procedures for Commission Review

48. When we adopted our 1986 preemption rule, we expressed concern about the burden that individual review of cases would place on Commission resources.[68] This concern is still valid. The Commission's responsibilities have substantially increased since 1986 given the advent of new technologies and regulatory responsibilities. Nonetheless, the Deerfield decision leads us to revisit our 1986 exhaustion requirement. Under Deerfield we must intervene before a federal court (and perhaps a state court) has ruled, or not intervene at all. We believe the latter option would be inconsistent with our broad statutory responsibility "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with

[68] Preemption Order, ¶ 40.

adequate facilities at reasonable charges."[69] In addition, we are concerned that the potential expense of our 1986 exhaustion requirement may have had a "chilling effect" on private vindication of the rights of both residential and commercial antenna users. Based on these considerations, we tentatively conclude that users should have the option of seeking Commission involvement.

49. The procedures we propose are intended to provide a forum for relatively prompt and relatively inexpensive resolution of satellite-antenna zoning disputes, keeping in mind the danger of overloading the Commission's staff and resources. Under our proposed rule, we would continue to require exhaustion of nonfederal administrative remedies, and we hope that our proposed rule (and the rulings in which we shall interpret it) will be sufficient to resolve the vast majority of zoning disputes at the local level. The requisite exhaustion is defined, however, in such a way that property owners will not be trapped in endless rounds of hearings and applications at the local level, effectively depriving them of speedy federal review. Although our proposed rule states that local remedies will be deemed exhausted if a petitioner's application has been pending for ninety days, we specifically seek comment on whether this time period is appropriate, given the nature of local zoning administration. A different period may more accurately reflect the amount of time required for local review of zoning applications.

50. The potential burden on Commission resources, together with some uncertainty about the volume of complaints that can be expected, lead us tentatively to reject the elaborate administrative review procedures suggested by the petitioners and some commenters. Instead, we propose a very simple procedure, set forth in subparagraph (e) of the proposed rule, that gives antenna users and municipalities every opportunity to be heard. The Commission will then act promptly and with enough clarity to minimize the need for Commission review of other cases as time goes on. We seek comments on the anticipated operation of this approach.

2. Revision of the Reasonableness Test

51. Paragraph (a) of our proposed rule states a test of reasonableness for all receive-only satellite antennas. Although we have retained the reasonableness approach rather than a per se preemption, our proposed formulation of this test includes significant revisions.

a. "Differentiation" and Inter-Service Competitiveness

52. Section 25.104, as currently written, contains a threshold "differentiation" requirement that limits federal preemption to ordinances that "differentiate between satellite receive-only antennas and other types of antenna facilities."[70] When we adopted this threshold requirement, we stated:

> Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment. . . . Communities wishing to preserve their historic character may limit the construction of "modern accoutrements" provided that such limitations affect all fixed external antennas in the same manner. In adopting this rule we intend that it

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[69] 47 U.S.C. § 151.

[70] 47 C.F.R. § 25.104.

> be a valid accommodation of local interests as well as of two federal interests, namely promoting interstate communications and historic preservation. Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas.[71]

53. As pointed out by several commenters, this threshold differentiation requirement appears to have caused unintended results.[72] In Deerfield, for example, the state court upheld a complete prohibition on satellite dishes for lots smaller than one-half acre, on the ground that the prohibition also applied to one other type of antenna.[73] The differentiation requirement also tends to obscure the full scope of the federal interest in this area. While we were rightly concerned in our Preemption Order with equal treatment for competing modes of communication, the current threshold differentiation requirement implicitly suggests that the federal interest begins and ends with equal treatment. This is not the case.

54. We therefore propose to remove the threshold differentiation requirement from section 25.104. We believe the concerns about local character and historical preservation that we expressed in our Preemption Order can be better accommodated by the proposed waiver provision we discuss below. We continue to be very concerned about equal treatment for competing communications technologies, but we believe we can better advance this competitive concern by adding subparagraph (a)(2), which explicitly and more narrowly focuses on competitiveness across technologies.

b. Cost and Reception Issues

55. We also propose to clarify the way our rule deals with ordinances and conditions that increase cost to the user or diminish reception. The current rule, for example, preempts any ordinance that "impose[s] costs on users . . . that are excessive in light of the purchase and installation cost of the equipment." In our discussions with representatives of local government, some have argued that if this approach is used, falling equipment costs threaten to rule out even those regulatory conditions that are absolutely necessary to ensure that antennas are safely installed. We can also take notice of the fact that at least one service provider, Prime Star, is beginning to offer direct-to-home video on a subscription basis without requiring subscribers to buy any equipment at all, a situation that seems not to have been contemplated by the existing rule.

56. Similarly, the current rule provides that an ordinance will be preempted if it "unreasonably limit[s] reception by receive-only antennas." American Satellite Television Alliance urges us to replace this "unreasonable limitation" standard with a rule preempting any regulation that "operate[s] to prevent reception of satellite delivered signals by receive-only antennas."[74] ASTA argues that the "unreasonable limitation" standard necessarily requires decisionmakers (courts or the Commission) to make judgments about content as a means of determining, for example, whether it is

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71 Preemption Order, ¶ 32.

72 See Petition at 26, Comments of ASTA.

73 See Deerfield, 992 F.2d at 425.

74 Comments of ASTA (July 12, 1993), at 18.

reasonable to impose a physical screening requirement that prevents reception of one satellite channel, e.g. HBO, as long as the antenna-user can receive another channel, e.g. the Disney Channel.

57. In addition, we note that the existing rule appears to require three separate determinations of "reasonableness": one about the stated local objective; another about the extent of any limitation on reception; and yet another about any costs imposed on users. While any application of our rule must be sensitive to a wide variety of competing concerns, the analytical complexity of the current formulation seems to obscure the central point, which is that any significant burden on a citizen's access to satellite communications must be justified by a local policy that can overcome the federal interests in access and competition.

58. We therefore propose to reformulate the reasonableness test to eliminate any "balancing" as to issues of cost and reception. Under our proposed paragraph (a), the reasonableness test only applies to ordinances that substantially limit reception, or impose substantial costs on users. This is more than a semantic change. In this context at least, "substantial" is by no means equivalent to "enough to be unreasonable." Instead, it is a rather low threshold, indicating only that a federal interest has been burdened in a way that is not insignificant, and which therefore calls for justification.

59. We believe this reformulation would also ameliorate ASTA's constitutional concerns about content-based regulation, by treating the amount of satellite programming one receives as a threshold issue and keeping the real focus on the reasonableness of the balance struck between the competing local and federal interests. We welcome comments on whether some other formulation of the test in section 25.104(c) would provide greater guidance without imposing excessive rigidity.

c. Presumptions of Unreasonableness

60. Two DBS providers urge us to preempt per se all local regulation of receive-only[75] antennas one meter or less in diameter.[76] Similarly, Hughes suggests that we preempt per se all local regulation of antennas up to two meters in diameter in commercial or industrial areas. We do not propose to adopt either of these per se preemptions at this time.

61. There are two basic arguments in favor of a per se approach to smaller antennas. First, the interests of municipalities in regulating such antennas should be diminished, since these antennas do not appear to raise the aesthetic concerns that have prompted many communities to restrict installation of larger antennas. Second, most of these antennas can be installed quickly and inexpensively -- some by the consumer without assistance -- making any permit process particularly burdensome and unnecessary in relation to other equipment and installation costs.

62. In addition, a standard based on underlying land-use designations gives appropriate weight to local autonomy by allowing local authorities greater latitude to restrict satellite installations

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[75] Satellite transmitting antennas would receive the same degree of federal protection, except that health and safety regulations related to radio frequency radiation would not be preempted. See proposed section 25.104(d).

[76] DirecTv and USSB proposed preempting all regulation of antennas twenty-four inches or smaller. We are proposing to preempt regulation of antennas one meter or smaller to include not only DBS antennas but the antennas of similar services. Although they are somewhat larger than DBS antennas at this time, we believe these other antennas are sufficiently similar to DBS antennas in that they will usually have little or no visual impact.

in areas that are otherwise highly restricted (e.g., residential areas), but less latitude in areas that are otherwise less restricted (namely, areas in which commercial or industrial activity is permitted). Thus, the per se preemption advocated by Hughes would be limited to areas in which the community has already exercised its police powers and has expressly decided to tolerate the negative visual impact that normally comes with commercial or industrial activity. When mounted on the ground, a two-meter antenna will be no more unsightly than many dumpsters or signs found in such areas. When roof-mounted, antennas of this size will be unseen by most people, and should in any event create no more visual blight than a common commercial rooftop air conditioner.

63. However, local government representatives strenuously object to any type of per se preemption. They point out that aesthetic equivalence between small satellite dishes and other structures does not mean that there are no non-aesthetic reasons, such as health and safety, for treating satellite antennas differently. They argue that a per se approach to preemption would eliminate any opportunity for consideration of these local justifications, amounting to a federal usurpation of their prerogative to balance the competing interests in the first instance. In addition, local authorities contend that the record does not contain sufficient evidence of actual interference with the installation, use, or maintenance of VSAT or DBS antennas.

64. We decline to propose a per se approach at this time. Instead, we propose a presumption of unreasonableness for the situations cited by the DBS and VSAT industries. Under our proposed paragraph (b), any ordinance that substantially increases the cost or substantially limits the reception of an antenna smaller than one meter would be subject to the basic reasonableness test, but would be presumed unreasonable. The same would be true of any ordinance that substantially increases the cost or substantially limits the reception of an antenna smaller than two meters in a commercial or industrial area. Both of the presumptions we propose would be rebuttable upon a showing by the local authority that the restriction in question is (1) necessary to accomplish a local health or safety objective; (2) no more burdensome than necessary to achieve that objective; and (3) specifically applicable to the class of antennas subject to the presumption. The first two of these "rebuttal criteria" guarantee that important local interests in health and safety can be accommodated despite the diminished aesthetic impact of smaller dishes. The third rebuttal criterion recognizes that many local ordinances do not yet distinguish among types or sizes of satellite antennas, and that a local judgment that does recognize a possible distinction but expressly balances the competing policies for the precise type of antenna in question is entitled to greater federal deference than a sweeping restriction on a larger class of antennas.

65. We tentatively prefer the approach proposed here to a per se approach for two primary reasons. First, the use of rebuttable presumptions affords local authorities an opportunity to articulate the policies they are pursuing, while a per se approach essentially assumes that these local interests are of no more than secondary importance. Even though we are proposing a "waiver" provision that could permit local government to vindicate their regulations even under a per se approach, the waiver provision would require an application from the local authority, citing "local concerns of a highly specialized or unusual nature." By contrast, the presumptions we propose could be rebutted in the context of any particular case. Second, the presumption approach is a more incremental solution to the problems cited in the record. The importance and centrality of the local interests that would be subordinated by a per se approach lead us to embrace this more moderate alternative at this time, even though we thereby risk the possibility that further Commission action will be required in the future.

66. In making this proposal, we recognize that no DBS satellites had been launched and no service was being provided when the Commission issued its public notice calling for comments on the Hughes and SBCA petitions. Thus, the record does not contain evidence of specific cases in

which zoning regulations have impeded the installation of these smaller antennas. However, the record does indicate that many of the ordinances restricting residential installation would, on their face, apply to DBS antennas.[77] We are concerned that as DBS service and other direct-to-home video services begin to expand, local zoning regulations may inhibit access in a way similar to that described in this record for C-band antennas. We ask for specific comments on whether this concern is valid. We also seek comment, particularly from local governments, about whether the presumption for "areas where commercial or industrial uses are generally permitted" is framed narrowly enough to accommodate "spot zoning" for isolated commercial uses in otherwise residential areas.

d. Other Revisions of the Reasonableness Test

67. In addition to the changes proposed above, we propose two more modest revisions to the reasonableness test. First, the proposed rule states explicitly that the burden of demonstrating that a regulation complies with section 25.104 is on the governmental entity that promulgates the regulation. We believe this allocation of the burden is required where a federally sanctioned interest in receiving satellite communications has been burdened in some substantial way. Second, the proposed rule now includes a requirement that any nonfederal objective offered to save a regulation from preemption must be expressly stated in the regulation itself. One court has interpreted the existing rule as requiring such an express statement,[78] and we believe it will facilitate a more sensitive review of local ordinances by the Commission. Third, paragraph (a) now refers expressly to the federal interest in ensuring that nonfederal regulations do not adversely affect efficient competition among alternative communications technologies by creating unwarranted constraints on user preference. We seek comment on the anticipated effects of these proposed revisions.

3. Waivers

68. Subparagraph (f) of our proposed rule provides, for the first time, an explicit means by which communities can ask the Commission to waive section 25.104 entirely or in part, in recognition of local interests.[79] We believe such waivers must be available in order to prevent our proposed rules from intruding on local autonomy any more than is necessary to protect the federal interest. We expect the waiver process to promote both federal and nonfederal interests, by allowing us to accommodate compelling local interests, for example, those related to historic districts, where they arise without in any way relaxing the rules that must apply in the vast majority of cases.

4. Petitions for Declaratory Ruling

69. Both petitioners request declaratory orders and assert that a rulemaking is not necessary. However, the language of the current rule simply will not bear the per se "interpretations"

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[77] For example, the ordinance at issue in Deerfield prohibited the installation of any "dish" antenna on a lot less than one-half acre in size. Similarly, other ordinances cited by commenters require neighborhood consent, screening, permit fees, or engineering drawings for all dish antennas, regardless of size. In addition, some ordinances requiring set-backs or prohibiting roof mounting do not take into account the size of the dish.

[78] Cawley v. City of Port Jervis, 753 F. Supp. at 132. See also Hunter v. City of Whittier, 257 Cal. Rptr. 559 (Cal. App. 1989).

[79] Previously, any request for a waiver of our preemption rule could only have been made under our general waiver provision, 47 C.F.R. § 1.3.

both petitioners request. The primary obstacle is the threshold "differentiation requirement" in the current rule, which only permits preemption of ordinances that treat satellite antennas differently from other antennas. Because of this differentiation requirement, the current rule clearly would not preempt an ordinance stating, for example, that no home or place of business may affix any outdoor antenna of any kind. To "interpret" the rule otherwise would do violence to the distinction between creating and interpreting a rule.

70. In addition, even without the difficulty presented by the differentiation requirement, the current rule is clearly phrased in terms of the reasonableness of the local regulation. To interpret this rule as a per se preemption of restrictions on any particular class of antennas would suggest that local interests could never be significant enough to permit any regulation of certain antenna types. As we have indicated, this would be unduly dismissive of the strong local interest in appropriate land-use regulation. The rule change we propose, unlike an "interpretation" of the existing rule, sets forth a more nuanced approach based on rebuttable presumptions, and adds an explicit "waiver" procedure that covers unusual cases. Proceeding by rulemaking also permits us to solicit further comments from representatives of local governments, and to focus those comments on our specific proposal. Given our respect for the principles of federalism, we believe this notice and comment procedure is of great import.

71. Although we believe these considerations require a rulemaking rather than declaratory relief, we nonetheless agree with the petitioners' concerns that immediate relief should be available in particular cases. Thus, we will entertain petitions for declaratory relief under the current rule in particular cases on an interim basis, until the completion of this rulemaking.[80] Petitioners for such relief must show that they have exhausted local administrative remedies.[81] This modification of our current exhaustion requirement is necessary for the Commission to discharge its responsibilities in light of the Second Circuit's Deerfield decision.[82] This action will provide an opportunity for immediate relief to satellite-antenna users that can demonstrate that they are facing unreasonably restrictive local zoning practices.

5. Miscellaneous Matters

72. SBCA and other commenters urge us to state specifically that antenna users have a federally protected right of access to satellite-delivered programming subject to limitations imposed by federal law.[83] ASTA cites an opinion from the U.S. District Court for the Northern District of California holding the Commission's rule did not create a federal right that could be enforced by an action under 42 U.S.C. § 1983.[84] Related to this is the question of whether attorneys' fees can be

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[80] This action is consistent with our statement in the Preemption Order that the Commission would entertain requests for further action if it appeared warranted. Preemption Order at ¶ 40.

[81] See e.g., proposed § 25.104 (e).

[82] See generally Part III.B.5.

[83] SBCA Petition 10-15. See also comments of ASTA. Another 1991 commenter, Michael Couzens, quotes legislative history of section 705, 47 U.S.C. § 605, in support of his argument that Congress intended to establish a right of reception. See also reply comments of EDS Video Services at 6.

[84] Johnson v. Pleasanton, 781 F. Supp. 632 (N.D. Cal. 1991).

recovered by a victorious plaintiff under 42 U.S.C. § 1988. Some commenters assert that the ability to sue for attorneys fees is crucial to private enforcement of the Commission's preemption rule.[85]

73. We are not persuaded that it is appropriate for the Commission to say anything more than it has said in the past on this issue. We have referred many times to various federal "rights" protected under section 25.014. In the Preemption Order, we declared that, based on sections 151 and 705 of the Communications Act, there is "a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation."[86] In the Deerfield order, we reaffirmed our position that the rule is "based on the concern that excessive local regulation would unduly interfere with the federally guaranteed right of earth station antenna users to receive certain satellite signals for private home viewing."[87] In addition, we have always contemplated that our rule would enable satellite-antenna users to "use the standards adopted here in pursuing any legal remedies they might have."[88] The interpretation of §§ 1983 and 1988 is better left to the federal judiciary.

74. The National Association of Broadcasters (NAB) has requested that the Commission consider expanding the scope of its preemption to reach all communications facilities including broadcasting antennas.[89] The NAB asserts that by imposing restrictions, nonfederal authorities are, in effect, "un-licensing" FCC licensed facilities. NAB provides details of difficulties that broadcasters have encountered in building antenna facilities and expresses concern that new technologies such as Advanced Television (ATV) and terrestrial digital audio broadcasting (DAB) may be difficult to implement if providers cannot put up new antennas. The Association for Maximum Service Television, Inc. ("MSTV") expresses similar concerns and states that because of changes in the relationship between cable systems and broadcast stations resulting from the 1992 Cable Act, the Commission can no longer rely on the assumption of universal cable carriage of broadcast signals. According to MSTV, many people have removed their antennas because they subscribe to cable and if local zoning restrictions inhibit new antenna installations, homes may not be capable of receiving broadcast programming not carried by cable. The American Radio Relay League also requests that the Commission clarify its amateur radio policies.[90]

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85 See Comments of ASTA (July 9, 1993), at 15; Comments of Michael Couzens (July 12, 1991), at 4.

86 Preemption Order, ¶ 23.

87 7 FCC Rcd at 2172, ¶ 2.

88 Preemption Order, ¶ 40. Section 1983 has been used as a jurisdictional basis for lawsuits brought by earth station owners to challenge local zoning laws.

89 Comments of NAB.

90 Comments of ARRL. See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 50 Fed. Reg. 38813 (September 25, 1985) (PRB 1).

75. We decline to expand the scope of this proceeding to include preemption of local regulation of all antennas.[91] The focus of this proceeding is satellite earth stations and is based on a record detailing problems with satellite antennas. Expansion to other types of facilities would be inappropriate. However, we note this should not be construed as approval of unreasonable local regulation of non-satellite antenna facilities. The Commission is committed to assist in the expansion of telecommunications in general. Local regulation that needlessly inhibits such expansion is contrary to our goals and policies.

76. We also decline, as we did when we adopted the original satellite-antenna preemption rule, to enumerate specific types of ordinances that would violate the rule. As pointed out by ASTA, any list could not include all possible preemptable regulations and therefore could lead to circumvention of our policies.[92]

77. Finally, we call attention to two possible avenues for voluntary, cooperative approaches to the problems in this record, which satellite antenna interests and local governments can implement independently of the outcome of this proceeding. First, we support suggestions by municipal representatives that educational efforts could eliminate some problems that antenna users are experiencing with local zoning boards. While we sympathize with the difficulty of pursuing policy changes simultaneously in 10,000 different local jurisdictions, informational campaigns undertaken jointly by satellite service providers and associations representing local governments may be effective in reducing the number of zoning disputes to more manageable proportions than the record before us indicates. Second, a group called the Building Officials & Code Administrators International, Inc. (BOCA)[93] suggests that the process to change model building codes that are often adopted by local jurisdictions could be used to resolve problems with antenna regulations. BOCA proposes that its process be used as an alternative to federal preemption. Because the model code process is not mandatory and would not apply to all jurisdictions, we do not believe that it can replace our preemption policies. Nonetheless, a model code would certainly be helpful, providing more certainty for users and promoting cooperation and communication among all those involved. We welcome suggestions of other approaches which, either alone or in conjunction with our proposed rule changes, could be effective in resolving many disputes before they come to our attention.

IV. CONCLUSION

78. Based on the record compiled here, we tentatively conclude that we must modify the exhaustion requirement we included in our 1986 Preemption Order. Under the Second Circuit's Deerfield decision, our current policy would prevent us from discharging our duty to interpret and enforce our preemption rule. We further conclude tentatively that, given the change we must make to our exhaustion policy, we must modify section 25.104 of our rules to provide greater clarity for users, local governments, and all those who must construe that rule and our interpretations of it. In addition,

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91 The Commission reached the same conclusion when it denied NAB's Petition for Partial Reconsideration in 1987. The Commission is considering the matter of RF radiation hazard in the context of another proceeding, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62.

92 Comments of ASTA at n. 10.

93 Letter from Building Officials and Code Administrators International, February 21, 1995, where the organization is described as "a private not-for-profit association of code officials, designers, manufacturers, and others interested in regulating building construction efficiently."

we hope the proposed modifications of our preemption rule will address the evidence in this record that local land-use, building, and similar regulations have impeded users' access to satellite communications and inhibited the development of satellite-based technologies. We believe that these proposals will promote greater access to these important services and will also promote economic growth and efficiency by providing for quick and cost-effective antenna installation without unreasonable local barriers. We also believe that our proposals are crafted in such as way as to minimize federal interference with local autonomy. We solicit comments from all interested parties, including service providers, equipment manufacturers, consumers, programmers, land-use managers, and other representatives of local governments. A full and complete record in this matter will ensure that our final rule takes into consideration the views of all these persons.

V. PROCEDURAL MATTERS

79. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

80. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix III. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

81. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before July 14, 1995 and reply comments on or before August 15, 1995. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Rosalee Chiara at (202) 739-0730.

VI. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303(r) NOTICE IS HEREBY GIVEN of the proposed amendments to section 25.104 of the Commission's Rules, 47 C.F.R. § 25.104, in accordance with the proposals in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals.

83. IT IS FURTHER ORDERED that the petitions for declaratory relief filed by SBCA and Hughes are DENIED.